

In the Matter of: Objections to Issuance of 327 Article 3 Construction Permit Application Plans and Specifications for Wastewater Treatment Plant and Sanitary Sewer System, Permit Approval No. 17872, Permit Approval No. 17872R , Twin Lakes Regional Sewer District, Monticello, Carroll and White Counties, Indiana. 2007 OEA 53 (06-S-J-3702) Permit Approval No. 17872, (06-S-J-3762) Permit Approval No. 17872R

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 53, cite this case as *Twin Lakes Regional Sewer District, 2007 OEA 53.*

TOPICS:

Motion for Summary Judgment	modified district plan
Motion to Dismiss	Notice of Incomplete Filing
substantial evidence	collateral attack
burden	NPDES permit
assertions of opinions	flow data
<i>de novo</i> review	households occupied
water pollution/control facility	growth component
<i>pro se</i>	future potential violations
revised permit	IC 4-21.5-3-23
consolidated	IC 4-21.5-3-24
inadequate review	IC 4-21.5-3-27
inadequate design	IC 13-15-6-1
treatment system	IC 13-15-6-2
phosphorus	IC 13-15-6-3
properly sized	315 IAC 1-3-2(b)
waste	327 IAC 3
grinder pump	Trial Rule 12(b)(6)
alternate pumping system	<i>Kunz</i>

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Petitioners: Deborah E. Albright, Esq.
Permittee: Donald J. Tribbett, Esq.
IDEM: Nancy A. Holloran, Esq., Timothy J. Junk, Esq.

ORDER ISSUED:

April 11, 2007

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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- Petitioners' October 26, 2006 Response to Motion to Dismiss/for Summary Judgment ("Response"),
- Petitioners' October 27, 2006 Motion to Include Affidavit in Response to Motion to Dismiss/For Summary Judgment,
- Twin Lakes' November 29, 2006 Reply to Petitioners' Response to Motion to Dismiss/for Summary Judgment,
- Twin Lakes' November 29, 2006 Motion for Leave to File Reply to Petitioners' Response to Motion to Dismiss,
- Court's December 5, 2006 Report of Final Prehearing Conference, Consolidation Order and Case Management Order,
- Petitioners' December 10, 2006 Motion for Continuance of Hearing,
- Petitioners' December 11, 2006 Sur-Reply to Motion to Dismiss/for Summary Judgment,
- Twin Lakes' December 18, 2006 Response to Petitioners' Sur-Reply,
- Petitioners' December 21, 2006 Proposed Findings of Fact, Conclusions of Law and Order, and
- all other documents filed with the Court;

AND THE COURT, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. The Indiana Department of Environmental Management (the "IDEM") issued Construction Permit Approval No. 17872 (the "Permit") to the Twin Lakes Regional Sewer District ("Twin Lakes") on March 20, 2006. The Permit allowed Twin Lakes to construct a water pollution/control facility. Petitions for Administrative Review of this construction permit were assigned Office of Environmental Adjudication ("OEA") Cause Number 06-S-J-3702.
2. Over two hundred (200) individuals, *pro se*, filed letters construed by OEA as timely Petitions for Administrative Review. Those individuals were named on the distribution list on the Court's May 1, 2006 Order Scheduling Prehearing Conference, Stay Hearing and Order to Amend Petitions for Administrative Review, and on the Court's June 6, 2006 Report of May 24, 2006 Prehearing Conference, Notice of Proposed Order of Default and Case Management Order.

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3. Approximately twenty (20) individuals attended the May 24, 2006 Prehearing Conference. Deborah E. Albright, Esq., attended, submitted an Appearance as legal counsel for specified petitioners, and indicated that she might represent additional Petitioners. Petitioner Town of Yeoman sent no representatives, legal or staff, and did not participate in any proceedings in the instant cause. As the case proceeded after the prehearing conference, only Petitioners represented by counsel Albright remained parties to the cause (others were defaulted or requested withdrawal); those Petitioners are: Gregory R. Smith, Don Long, Sherry Long, Luana Wetli, Beth Kinder, Terry Dill, Chris Vogel, Vicki Vogel, Nell Greenburg, John Peters, Carol Beecher, Mary Reid, Robert Reid, Richard Wilken, Nancy Wilken, Dean Trennepohl, and Sheila Hibbetts. In some filings before the Court, Petitioners refer to themselves as Citizens Opposed to Phase Three, or COPT. Twin Lakes filed a modified district plan, after which IDEM issued Construction Permit Approval No. 17872R (the "Revised Permit") to Twin Lakes, which was timely appealed on July 28, 2006. The Revised Permit allowed construction of a water pollution/control facility. The Petition for Administrative Review of the Revised construction Permit was assigned Office of Environmental Adjudication Cause Number 06-S-J-3762.
4. The Revised Permit differed from the original Permit in that the Revised Permit excluded a municipality (Town of Yeoman), the existence of an office located in or near the Town of Yeoman, and a deceleration lane required by the Indiana Department of Transportation for the omitted office.
5. The Petitions for Administrative Review of the Permit and the Revised Permit were ordered consolidated on December 5, 2006, due to their involving common questions of fact and law.
6. The Court's December 5, 2006 Order provided further opportunity for the parties to submit briefing on Twin Lakes' Motion to Dismiss and/or for Summary Judgment ("Motion"), and indicated that oral argument on the dispositive Motion would be conducted if a party so moved. No motion for oral argument was filed with the Court.
7. Petitioners based their Petition for Administrative Review upon the following contentions:
 - a. Inadequate review by IDEM of the facility's design, and inadequacy of design, due to failure to require a treatment system for phosphorus;
 - b. Insufficient information submitted by the applicant and reviewed by IDEM relative to whether the facility is properly sized to provide adequate waste water treatment, particularly in estimating the amount of waste to be anticipated in the system; and
 - c. Grinder pumps likely to fail and need for a[n] alternate pumping system.

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8. Petitioners alleged a fourth issue, the failure of Twin Lakes to submit a modified district plan for the area intended to be served, making it impossible for IDEM to assess whether the proposed facility is properly sized and designed for the population to be served. Petitioners indicated that IDEM's witness¹ acknowledged Twin Lakes' submission of a modified district plan², and conceded that this issue should be dismissed.
9. Respondent Twin Lakes sought dismissal and/or a summary judgment ruling adverse to Petitioners' Petition for Administrative Review ("Petition") for lack of legal sufficiency required in Ind. Code §13-15-6-2, based upon the following contentions:
 - a. the Petition did not identify the permit terms and conditions which would, in Petitioners' judgment, be appropriate to satisfy the legal requirements for the type of permit issued by IDEM;
 - b. the Petition did not specifically identify the concerns and technical deficiencies, as required in 315 IAC 1-3-2(b);
 - c. Petitioners' failure to identify which portions of the permit to which they are objecting did not comply with the Court's August 7, 2006 Notice of Incomplete Filing and Order to Amendment Petition.
10. Respondent further attacked the legal sufficiency of Petitioners' contentions as follows:
 - a. The contention that the facility design is insufficient to treat effluent for phosphorus procedurally fails as a collateral attack on NPDES permit no. IN0062367. Substantively, Petitioners did not adequately support their allegation, as Respondent's Affiant Tierney³ affirmed that effluent discharge will be fully compliant with the NPDES permit.
 - b. The contention that the facility was improperly sized is not adequately supported, and contrary to Respondent's studies conducted, including flow data projection of 176 gallons per day extrapolated from a review of existing flow data from other vicinity treatment facilities, a house count of properties within the project area to project, based upon the assumptions that all households would be occupied plus a 20% future growth component, as described in Mr. Tierney's affidavit.

¹ Lynne L. Newlon, "Regional Water and Sewer District Coordinator an[d] Environmental Manager in the Operations Section of the Office of Water Quality." August 31, 2006 Affidavit, Exhibit A to IDEM's September 1, 2006 Motion to Concur in Respondent Twin Lakes Regional Sewer District's Motion to Dismiss and/or for Summary Judgment. The Modified District Plan, dated May 23, 2006, was provided as Exhibit B to the Motion to Dismiss and/or for Summary Judgment.

² Ms. Newlon's Affidavit was an exhibit in Twin Lakes' September 1, 2006 Motion to Dismiss and/or for Summary Judgment, and in IDEM's October 26, 2006 Response to Motion to Dismiss/Motion for Summary Judgment.

³ Joseph P. Tierney, "employed by GRW Engineers, Inc. as the Project Manager/Engineer for Twin Lakes Regional Sewer District's Phase III project" for the construction permits at issue in this cause, August 31, 2006 Affidavit attached as Exhibit to Respondent's Motion to Dismiss and/or for Summary Judgment.

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- c. The contention that the E-1 grinder pumps are inadequate is not adequately supported, and is contrary to the evidence stated in Mr. Tierney's affidavit that related service calls for units in operation by Respondent is approximately one half of one percent (.5%), that usage in service for over 30 years have provided a cost effective, reliable service record. For the three bidding vendors for this project, the average grinder pump/control panel life span approximated 25 years, and an average time between service calls of 7 to 10 years.
11. IDEM's Motion to Concur with Twin Lakes characterized the three issues remaining in contention, as alleging future violations, and asserted, "[t]his Court has recognized the concept of future potential violations as a nonjurisdictional legal deficiency."
12. Petitioners presented evidence, in the form of an affidavit of Terry Dill, asserting that many of the homes in this project area are seasonal, without year-round occupancy. No further evidence was offered to indicate that the permit, as issued, did not comply with the technical requirements of 327 IAC 3.
13. Petitioners presented evidence, in the form of an affidavit of Dean Trennepohl, that copies of 192 pages of incident reports from Respondent Twin Lakes Regional Sewer District concerning grinder pump malfunctions. Mr. Trennepohl further opined that the incident reports underreport malfunctions, due to his exclusion of incident reports which he deemed not complete or not relating to grinder pumps. No further evidence was offered to indicate that the permit, as issued, did not comply with the technical requirements of 327 IAC 3.
14. The Permit provides sufficient capacity for effluent discharge as required in a construction permit issued under 327 IAC 3.
15. The Permitted construction was properly sized, as supported by Respondent's substantial evidence of flow data projection, existing flow data review, house count, household occupancy rates proffered by both parties, and future growth component projections, as required in a construction permit issued under 327 IAC 3.
16. Utilization of grinder pumps as provided in the Permit is adequately supported as providing service reliability and life span so as to comply with requirements for a construction permit issued under 327 IAC 3.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the agency actions of the Indiana Department of Environmental Management and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.

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2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*De novo* review” means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. This was held to be directly applicable to the Office of Environmental Adjudication in *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind.App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency’s interpretation. The Appellate Court reversed OEA’s decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review. at 781. The OEA must apply a *de novo* standard of review when making findings of fact and conclusions of law and may not defer to IDEM’s findings or conclusions.
5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* IC§ 4-21.5-3-27(d). OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” IC § 4-21.5-3-23(b). “Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.

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Motion to Dismiss

6. While IC § 4-21.5-3-24 addresses procedures, such as filing deadlines, for Motions to Dismiss, substantive provisions of Indiana’s Rules of Trial Procedures have been applied to motions to dismiss adjudicated before the OEA. “In reviewing a Rule 12(B)(6) motion, a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.” *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806, 814 (Ind. 2004).
7. In this Cause, Respondent Twin Lakes sought dismissal of the Petition, based on the Petition’s legal deficiency. IC § 13-15-6-2 requires that the written request for an adjudicatory hearing, or Petition, must contain the following information:
 - (1) State the name and address of the person making the request.
 - (2) Identify the interest of the person making the request.
 - (3) Identify any persons represented by the person making the request.
 - (4) State with particularity the reasons for the request.
 - (5) State with particularity the issues proposed for consideration at the hearing.
 - (6) Identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner’s action.
8. *Indiana Office of Environmental Adjudication, et al, v. Kunz*, 714 N.E.2d 1190 (Ind.Ct.App.1999)(“Kunz”) held that IC § 13-15-6-3(a)(1) requires that the petitioner meet the requirements of IC 13-15-6-2 in order to maintain an action before OEA. *See also In the matter of 327 IAC Article 3 Construction Permit Application Plans and Specification for Thompson/Emerson Barrett Law Sewer, SRF Loan No. CS18241101, Indianapolis, Marion County, Indiana, Cause No. 03-W-J-3225, 2004 OEA 40, 42-44* (“Thompson/Emerson”).
9. In addition to the requirements under IC § 13-15-6-2, 315 IAC 1-3-2(b) requires:

The petition for administrative review shall contain the following information:

 - (1) Name, address, and telephone number of each person filing the petition.
 - (2) Identification of the interest of each petitioner in the subject of the petition.
 - (3) Statement demonstrating that the petitioner is:
 - (A) a person to whom the order is directed;
 - (B) aggrieved or adversely affected by the order; or
 - (C) entitled to review under any law.

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- (4) Statement with particularity the legal issues proposed for consideration in the proceedings and in a case involving an appeal of a permit:
- (A) identification of environmental concerns or technical deficiencies related to the action of the commissioner which is the subject of the petition; and
 - (B) identification of permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.
10. *Kunz* applied IC § 13-15-6-1, -2 and 315 IAC 1-3-2(b) not to allow dismissal, but to require the OEA to set a hearing as contemplated in IC § 13-15-6-3 only after a petition complied with IC § 13-15-6-2. “A complaint in an administrative proceeding need not ‘enumerate precisely every event to which a hearing examiner may finally attach significance.’” *L.G. Balfour Co. v. Federal Trade Comm’n*, 442 F.2d 1, 19 (7th Cir. 1971). Rather, the purpose of the administrative complaint is to give the responding party notice of the charges against him. *Id.* Reversal shall not occur absent evidence that a party is misled by an administrative complaint, resulting in prejudicial error. *Id.*” *Kunz*, 714 N.E.2d 1190, 1196.
11. Despite Petitioners’ failure to identify the specific portions of the permit which they protested as stated in the Court’s August 7, 2006 Notice of Incomplete Filing and Order to Amendment Petition, the petition and its amendment contained sufficient information to notify the Court and Respondent as to the subject matter of Petitioners’ complaint. The face of Petitioners’ petition, and its amendment, when viewed in a light most favorable to Petitioners, as the nonmoving party, and given every reasonable inference to be drawn, contains information sufficient to overcome the standard that Petitioners would not be entitled to recover under any set of facts admissible under the allegations of the complaint. On Respondent’s Motion to Dismiss, just as the Supreme Court decided that Ms. Huffman must be given an opportunity to develop the facts to support her allegations, this Court must give Petitioners the same opportunity.

Motion for Summary Judgment

12. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” IC § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000).

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13. “On summary judgment, the moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Chenoweth v. Estate of Wilson*, 827 N.E.2d 44, 47 (Ind.Ct.App.2005). If this requirement is met, the burden shifts to the nonmovant to establish genuine issues of material fact for trial. *Id.*” *McGuire v. Century Surety Co.*, 861 N.E.2d 357, 365 (Ind.Ct.App.2007). Once the burden shifts to the nonmovant, the nonmovant is required to present some evidence to contradict the evidence presented by the movant in order for the nonmovant to prove that the movant’s motion for summary judgment should not be granted. *Id.*
14. Mere assertions of opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 759 (Ind. Ct. App. 1989)(citing *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985)).
15. The evidence filed before the Court on summary judgment and/or motion to dismiss by Respondent Twin Lakes sufficed to shift the burden to Petitioners to establish genuine issues of material fact on allegations raised in Petitioners’ Petition and its amendment. IDEM is required to review the permit application submitted by the Respondent under the technical standards set out in 327 IAC 3. Twin Lakes established adequate review by IDEM, along with substantive evidence to sustain the permit issuance on *de novo* review. Petitioners did not present some substantive evidence to contradict the evidence provided by Twin Lakes of the facility’s design, adequacy of design, the facility’s proper sizing to provide adequate waste water treatment, particularly in estimating the amount of waste to be anticipated in the system, nor concerning grinder pump failure or the requirement to utilize an alternative pumping system. *In the matter of 327 IAC Article 3 Construction Permit Application Plans and Specification for Thompson/Emerson Barrett Law Sewer, SRF Loan No. CS18241101, Indianapolis, Marion County, Indiana, Cause No. 03-W-J-3225, 2004 OEA 40, 42-44.*
16. Petitioners’ allegations concerning system sizing, phosphorus treatment capacities and grinder pump failure raise issues of prospective violations of state law or of a future permit to discharge (NPDES permit). The IDEM presumes that any person that receives a permit will comply with the applicable regulations and other permits. Respondent’s NPDES permit is not in controversy in this cause, and has not been consolidated in this cause. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law, including the requirements of another permit, if issued. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind.Off.Env.Adjud.); see also Thompson/Emerson.*
17. This Court may not consider Petitioners’ allegations of future violations as a basis for invalidating the Construction Permit.

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18. The Petitioners have not provided substantial evidence of a genuine issue of material fact concerning any deficiency in the construction permit or the IDEM's permit review process. Respondents have provided substantial evidence that no genuine issue of material fact exists which is dispositive of the issues in controversy.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Respondent, Twin Lakes Regional Sewer District's Motion to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that Respondent, Twin Lakes Regional Sewer District's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that further proceedings before this Court are hereby **VACATED**.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 11th day of April, 2007 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge